Dato Fong Chow & Ors v Pentadbir Tanah Daerah Jerantut & Anor

HIGH COURT (KUANTAN) – ORIGINATING MOTION NO 32-2-88
LAMIN J
30 JULY 1988

Land Law – Compulsory acquisition of land – Compensation to landowners – Delay in payment of compensation – Proposal to pay compensation by instalments within four years – Rejection by landowners – Whether contravention of art 13 of Federal Constitution – Question of limitation – 'Constructive possession' – Whether court could quash award of compensation – When payment of compensation should be made – Land Acquisition Act 1960, ss 10, 29(1) & 32(1)

The applicants are the registeredd owners of a piece of land which is the subject matter of a compulsory acquisition scheme. The procedure relating to land acquisition was duly complied with and an award was made in the sum of $70,000 per acre. The total sum for the whole area amounted to $1,606,750. A notice in Form H dated 25 August 1983 making an offer of compensation as awarded was accordingly served on the applicants who accepted it without any objection. As no payment had been made for more than a year, the applicants then wrote two letters dated 21 May 1985 and 30 July 1985 to the authority concerned asking for payment to be made as soon as possible. Still no payment was made. Then on 28 July 1987, the authority concerned held a meeting with the applicants in which a scheme of payment was proposed that the compensation would be paid by instalments within a period of four years. The applicants rejected the instalment proposal and filed their originating motion applying for declaratory orders: (a) that the Collector has contravened art 13 of the Federal Constitution, in failing to complete the acquisition proceedings in that he has failed to make payment as required under s 29 of the Land Acquisition Act, (b) as a result of the contravention by the said Collector of the constitutional rights of the applicants, the applicants have suffered damage, and (c) that the said Collector be required to pay the applicants the award of the sum of $1,606,750 and damages in the form of interest at the rate of 8% pa under s 32 of the Land Acquisition Act from 25 August 1983 to 25 February 1988 amounting to 4½ years of $578,430 and continuing.

Held, dismissing the application:

(1) Prayer (a) was refused as the court found no necessity to invoke art 13 of the Federal Constitution.

(2) Prayer (b) was also refused as the court found no contravention of the provisions of the Federal Constitution and therefore no damage was suffered by the applicants.

(3) Prayer (c) is allowed only to the extent that the applicants are entitled to the full sum of the original award of $1,606,750 with interest leviable under O 42 r 12 of the Rules of the High Court 1980 from date of judgment. As possession has not been taken, damages asked for under s 32 do not arise.

(4) Costs to the applicants.

Cases referred to

1 *Pemungut Hasil Tanah, Daerah Barat Daya, Pulau Penang* v *Ong Gaik Kee* [1983] 2 MLJ 35 (folld)
2 *Pemungut Hasil Tanah* v *Kam Gin Paik & Ors* [1983] 2 MLJ 390 (refd)

Legislation referred to

Federal Constitution art 13
Land Acquisition Act 1960 ss 8, 10, 12, 18(a), 29(1), 32(1), 35(3)
Land Acquisition (Amendment) Act 1984 (Act A575) s 21
Public Authorities Protection Act 1948 (Revised 1978 – Act 198) s 2(a)
Rules of the High Court 1980 O 42 r 12

Shah V Balendran for the applicants.
Wan Mohamed bin Muda for the respondents.

Cur Adv Vult

Lamin J: Briefly the facts in this case are as follows. The applicants are the registered owners of land CT 3528, Lot 541, Mukim Pedah, Jerantut (hereinafter referred to as 'the said land'). The said land was gazetted under s 8 of the Land Acquisition Act 1960 on 1 April 1982 vide State of Pahang Government Gazette Notification No 211. An inquiry as required under s 10 was held on 14 June 1983 at the conclusion of which an award was made in the sum of $70,000 per acre and that the total sum for the whole area amounted to $1,606,750. A notice in Form H dated 25 August 1983 making an offer of compensation as awarded was accordingly served on the applicants who then accepted it without any objection. As no payment had been made for more than a year, the applicants then wrote to the Pendaftar Tanah, Jerantut on 21 May 1985 (see exh FC 4(a) to the affidavit in support of the application at encl 1) asking for payment to be made as soon as possible. Then again on 30 July 1985 they wrote to the Pentadbir Tanah, Jerantut (see exh FC 4-B to encl 1). Still no payment was made. Then, on 20 July 1987, the Lembaga Kemajuan Negeri Pahang (the authority for which the land was acquired) wrote to all the applicants requesting for a meeting at Pejabat Daerah, Jerantut, to be held on 28 July 1987 with a view to discussing the question of making payment of the compensation. The result of the meeting was an offer of a scheme of payment in a manner as contained in a letter dated 2 January 1988 from the said Lembaga Kemajuan Negeri Pahang to the applicants wherein the said Lembaga proposed that the compensation would be paid by instalments within a period of four years beginning from January 1988 to August 1991 (see exh FC 10 to encl 4). To this the applicants responded through a letter from their solicitors dated 15 January 1988 (see exh FC 5 to encl 1) demanding payment of compensation within five days from the date of the receipt of the said letter failing which proceedings for the recovery of the compensation would be instituted. As no payment was forthcoming, solicitors for the applicants filed a notice of originating motion on 1 March 1988 (encl 1) applying for a declaratory order:

(a) that the Collector has contravened art 13 of the Federal Constitution in failing to complete the acquisition proceedings in that he has failed to make payment as required under s 29 of the Land Acquisition Act;

(b) as a result of the contravention by the said Collector of the constitutional rights of the applicants, the applicants have suffered damage; and

(c) that the said Collector be required to pay the applicants the award of the sum of $1,606,750 and damages in the form of interest at the rate of 8% pa under s 32 of the Land Acquisition Act from 25 August 1983 to 25 February 1988 amounting to four and a half years (4½ years) of $578,430 and continuing.

The first point that needs examination is whether, in view of the circumstances of this case, it is necessary to call into question art 13 of the Federal Constitution. There has been a decision on the interpretation of s 10 of the Land Acquisition Act where the delay is in respect of holding the inquiry for the purposes of determining the quantum of the award and that art 13 of the Federal Constitution was found unnecessary to assist the court in the way of seeking a solution. The learned Chief Justice Tun Salleh Abas as he then was in the case of *Pemungut Hasil Tanah, Daerah Barat Daya, Pulau Penang* v *Ong Gaik Kee*[1] (at p 37) had this to say:

> With respect we do not think that it is necessary to go so far as to invoke cl (2) of art 13. This clause lays down the constitutional standard of an expropriatory law so that 'no law shall provide for compulsory acquisition or use of property without adequate compensation'. We do not think that the constitutionality of the Land Acquisition Act is an issue here. No challenge is made by anyone against the Act for not providing adequate compensation, or in any way being contrary to this clause. This clause is therefore irrelevant for the purpose of this appeal.
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> We think that it is sufficient to decide this appeal on the basis of a simpler question, ie whether or not in view of the long delay resulting in an injustice to the landowner the acquisition was done in accordance with the law (the Land Acquisition Act). Only in the circumstance that it is not done in accordance with the Act can we say that the acquisition is contrary to the requirement of cl (1) of art 13 of the Federal Constitution which requires that to be lawful every deprivation of property must be done in accordance with law.

In the present case there is no question of the award being inadequate as the award had been made as a result of an inquiry held soon after the said land had been gazetted under s 8 and that award when offered under the notice in Form H was accepted without objection. There is also no question of deprivation of property as the said land had properly been gazetted and compensation was offered and had been accepted without objection. It has been strenuously argued before me that because of the delay in paying the compensation, it cannot be said that in the end the amount as awarded will still remain adequate. I am unable to accept this fallacious argument for the reasons which I shall give in a moment.

Before I deal with the main substance, I wish to dispose of at this juncture the question of limitation as it has been raised. Counsel for the applicants maintained that his application was not time-barred in terms of s 2 of the Public Authorities Protection Act 1948 (Revised 1978 – Act 198, s 2(a)). Form H, ie the notice to offer to pay the compensation as awarded, was dated 25 August 1983. In 1985, the applicants did ask for payment to be made as soon as possible (see exh FC 4(a) and FC 4(b) dated 21 May 1985 and 31 July 1985 respectively). But no payment was forthcoming. Subsequently the applicants were invited to attend a meeting at the Pejabat Daerah Jerantut on 20 July 1987 to discuss the payment of compensation. Some time after the meeting, by his letter dated 2 January 1988 (exhibited and marked 4C to encl 4A) the said Collector offered a scheme of payment whereby it was proposed that the compensation be paid by instalments within a period of four years beginning from January 1988 to August 1991 together with interest as calculated therein. The applicants could not agree to the proposal and their counsel then served the said Collector with a letter dated 15 January 1988 (exhibited and marked FC 5 to encl 1) demanding payment of the compensation within five days thereof failing which proceedings would be instituted for the recovery of the said sum. No payment was made, hence the present action. The learned counsel maintained that the 'act, default or complaint' for the purpose of s 2(a) of the Public Authorities Protection Act 1948 must be the proposal contained in the letter of 2 January 1988 and therefore the applicants' action was not out of time. I agree.

The scheme of the Land Acquisition Act 1960 before the 1984 amendment was that once gazetted under s 8, inquiry for the purposes of determining the quantum of compensation must be done as soon as possible or within a reasonable time. (In *Pemungut Hasil Tanah, Daerah Barat Daya* v *Ong Gaik Kee,*[1] a seven-year delay was decided unreasonable. In *Pemungut Hasil Tanah* v *Kam Gin Paik & Ors,*[2] an eight-year delay was decided unreasonable.) At the conclusion of the inquiry, the Collector is required to prepare a written award under his hand in Form G (s 14) and then he shall serve on each person interested a notice in Form H by way of an offer to pay the compensation as awarded and upon acceptance he is required under s 29(1) to make payment 'as soon as may be'. The making of payment does not take place at the point of taking possession. In other words, the taking of possession has nothing to do with the decision to make payment except that interest would be levied on the amount awarded if the compensation was not paid on or before taking possession of the said land (before the 1984 amendment) and the interest would run from the time of taking possession until the time of payment or deposit of the amount in court (s 32(1)). The Collector may take possession of the land at the time of the service upon the occupier of the said land of a notice in Form H or at any time thereafter (s 18(a)).

Now, in the present case an inquiry had been held and an offer of compensation had been made (Form H)

and the owner had signified his acceptance. The only delay was in the making of payment of the award. In my view the offer of compensation is, in essence, an admission on the part of the authority that it owes the owner of the land a sum to the value of the compensation and is prepared to pay. It becomes a debt due to the owner of the land especially so after the owner has signified his acceptance. So, simply for not paying this debt, the authority is not in breach of art 13 of the Federal Constitution. This debt must be settled 'as soon as may be' as required by s 29(1) of the Land Acquisition Act. The said provision merely stipulates the time frame within which a debt must be settled. If it is not paid within whatever time, the owner of the land is entitled to sue for the money as long as he is not time-barred. In the present case the offer was made by way of a notice in Form H on 25 August 1983 and served and duly accepted without objection by the owners of the land. In January and July 1985, the owners reminded the authority to make the payment. Somehow they further chose to wait and even responded to the invitation from the authority for a meeting which they attended on 28 July 1987. Apparently the authority wanted to negotiate for suitable terms by which to make the payment. On 2 January 1988, the Collector made an offer of a scheme of payment by instalment to be disposed of within four years and only then the owners took up the matter with their solicitors, when on 15 January 1988 their solicitors wrote to the Collector asking for payment of the compensation to be made within five days failing which a suit would be filed against it. With regard to the alleged delay in settling the compensation, I must say the owners themselves have contributed to the delay. They cannot come and say now they should be further compensated in whatever form.

The next point I would like to deal with here is in respect of the idea of 'constructive possession' because it was urged upon me to read it into the Act, particularly with regard to the time of payment under s 29 in conjunction with the computation of interest under s 32(1). I do not think that 'constructive possession' can be imported into the Act. The Act provides for various incidents of taking possession such as formal possession, possession in urgent cases and possession at the time of service upon the occupier of the land of a notice in Form H. Most importantly, it must be remembered that the Collector has the power under s 18(a) to take possession 'at any time' after the service of Form H. This strongly suggests that no other ideas of 'possession' can be read into the Act and if the Act intends otherwise, the legislature would have said so in some form.

Counsel for the applicants did urge this court at the early stage of his submission to quash the award. The court has no power to do this in the circumstances of this case where the award was made after the conclusion of an inquiry under s 12 which commenced soon after the said land had been gazetted under s 8. By serving a notice under Form H as I have pointed out earlier, it was an admission by the Collector of his liability to pay the compensation and especially so after due acceptance of the offer by the owners of the land, the sum awarded became as it were a debt due from the Collector to the owners in respect of which the owners are in law entitled to recovery. The court has no power in law to quash this 'debt'. The only recourse for the owners (the applicants) is to seek recovery of the debt (award) and apply for interest to be levied like any judgment debt under O 42 r 12 of the Rules of the High Court 1980.

The learned state legal adviser, inter alia, argued that there was no provision under the Act to pay the award, not until possession had been taken. He supported his argument with a further ground in that the state authority is at liberty to withdraw from the acquisition of the land at any time before possession had been taken (s 35). As I have pointed out earlier, the taking of possession is not a condition precedent to the payment of the award under s 29. All it says is that the Collector shall make payment 'as soon as may be'. It must be remembered that upon withdrawal compensation still has to be made (s 35) and it will be computed in accordance with the First Schedule with certain adjustments allowable at the discretion of the Collector. I say so because all the provisions in the First Schedule are meant for the computation with respect to land 'acquired' but the Schedule does not lay down separate methods of computation for cases of withdrawal. The Collector, however, is allowed to make the adjustment within the permissible limits of sub-s (3) of s 35 as indicated by the words 'as far as may be'. Admittedly those words lack certainty. For so long as there is no withdrawal by the state authority, the original award stands and so also thereafter the liability to pay the compensation as originally awarded.

In view of s 21 of the Land Acquisition (Amendment) Act 1984 (Act A575), the law before the amendment will apply in the present case. Counsel for the applicants submitted that it was reasonable to envisage in s 32 that possession was to take place before or soon after the making of an award, if not it would be unconstitutional. It is quite clear to me that s 32 only provides for payment of interest of 6% pa (before the 1984 amendment) if the award is not paid or deposited in court 'on or before the taking of possession', and such interest shall run from the time of taking possession to the time of payment or deposit into court. As no possession has been taken in the present case, therefore, no such interest can be levied.

In the circumstances of the present case, perhaps the next question that requires an answer is whether the law demands that compensation be paid in one lump sum or whether the payment can be done by instalments. By a letter dated 2 January 1988 (exh FC 10), Lembaga

Kemajuan Negeri Pahang (LKNP) offered to pay by instalments to be completed within a period of four years. There are no clear provisions either way except that the words 'each amount awarded' appearing in s 29(1) do seem to suggest a lump sum payment. My own view is that payment by instalments is permissible if both parties agree.

For the above reasons the application for a declaration as per encl 1:

(a) in terms of para 1(a) is therefore refused as I found no necessity to invoke art 13 of the Federal Constitution;
(b) in terms of para 1(b) is also refused as I find no contravention of the provisions of the Federal Constitution and therefore no damage suffered by the applicants;
(c) in terms of para 1(c) is allowed only to the extent that the applicants are entitled to the full sum of the original award of $1,606,750 with interest leviable under O 42 r 12 of the Rules of the High Court 1980 from date of judgment (17 June 1988). Also, as I find that possession has not been taken, damages asked for under s 32 do not arise; and
(d) costs to the applicants.

Order accordingly.

Solicitors: *Balendran Chong Haranay & Bodi.*

Reported by *Wong Kim Fatt*

Bank Bumiputra Malaysia Bhd v Syarikat Kejuruteraan Hong Huat Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) – SUIT NO C23-485-86
GUNN CHIT TUAN J
22 JULY 1988

Banking – Overdraft banking facility – Security – Charge on land – Joint and several guarantee by directors – Further security in form of deed of assignment – Whether deed of assignment an absolute one or by way of charge only – Right of assignee to sue assignor's debtors – Civil Law Act 1956, s 4(3)

The plaintiff applied for summary judgment under O 14 against the first defendant and also applied for summary judgment against two other parties. Both applications were heard and dismissed by the senior assistant registrar. The plaintiff appealed to the judge.

By a loan agreement made on 11 October 1983 between the first defendant and the plaintiff, the latter agreed to grant to the first defendant an overdraft facility up to the limit of $2,800,000 for principal only upon the terms and conditions appearing in the said agreement. As security the first defendant created a charge under the National Land Code 1965 and also caused its directors to execute a joint and several guarantee. As further security for the overdraft facility the first defendant also executed two deeds of assignment in favour of the plaintiff under the terms of which it assigned to the plaintiff all the proceeds under a project undertaken by the first defendant known as Malacca Seafront Reclamation Project. However, instead of proceeding to enforce any of the securities, the plaintiff chose to issue a writ against the first defendant and four others claiming the sum of $3,710,380.68, interest and costs.

The plaintiff contended that the said deeds of assignment were not absolute and the assignee could not maintain a suit against the assignor's debtors. It also contended that the right to sue for the debt was not assigned and that only part of the debts of $12,000,000 and $15,470,000 was assigned for the overdraft facilities granted up to a sum of $2,800,000.

Held, allowing the appeal:

(1) Whether or not an assignment is an absolute one (not purporting to be by way of charge only) within the meaning of s 4(3) of the Civil Law Act 1956 is to be gathered only from the four corners of the instrument itself.

(2) Looking at the whole of the deeds of assignment of 12 October 1983, the learned judge was of the opinion that the documents were absolute assignments and not purporting to be by way of charge only within the meaning of s 4(3) of the Civil Law Act. The assignments were absolute in the sense that the assignor intended to transfer to the assignee 'all moneys, interests and rights now or hereafter become due and payable to the assignor'.

(3) Even if the assignments were not absolute, nevertheless, cl 7 of the deeds of assignment gave the plaintiff the right to take legal action at any time against the assignor itself for the recovery of the banking facilities or any part thereof together with interest thereon without having to enforce the securities given under the said loan agreement.

(4) The plaintiff was given liberty to sign judgment as prayed against the first, fourth and fifth defendants.

Cases referred to

1 *Nouvau Mont Dor (M) Sdn Bhd* v *Faber Development Sdn Bhd* [1984] 2 MLJ 268 (folld)
2 *The Mercantile Bank of London Ltd* v *Evans* [1899] 2 QB 613 (refd)

Legislation referred to

Civil Law Act 1956 s 4(3)

Abdul Razak bin Ibrahim for the appellant/plaintiff.
K Balaguru for the respondent/first defendant.

Cur Adv Vult

Gunn Chit Tuan J: By a summons-in-chambers dated 29 September 1986, Bank Bumiputra Malaysia Bhd (the plaintiff) applied for leave to sign final judgment against Syarikat Kejuruteraan Hong Huat Sdn Bhd (the first defendant) under O 14 of the Rules of the High Court 1980. By another similar application by way of summons-in-chambers dated 18 November 1986, the plaintiff also applied for leave to sign final judgment against one Mohd Sidi bin Maasim and Tan Wah Lye for $3,710,380.68, interest thereon at the rate of 4.5% pa above the plaintiff's base lending rate which was then 9.75% pa with